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Application of the Audit Privilege to Occupational Safety and Health Audits: Lessons Learned from Environmental Audits

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APPLICATION OF THE AUDIT PRIVILEGE TO OCCUPATIONAL SAFETY AND HEALTH AUDITS: LESSONS LEARNED FROM ENVIRONMENTAL AUDITS

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For a number of years, there has been uncertainty over whether (or under what conditions) an evidentiary privilege, sometimes referred to as the "audit privilege," will apply to protect corporate self-audits of compliance with environmental laws and regulations. The doubt has persisted because a clearly defined and consistently applied environmental audit privilege doctrine has not emerged in the federal case law. To encourage corporations to conduct audits, a number of state legislatures have enacted statutes granting some form of audit privilege or immunity from use of audits against the corporation if certain conditions are met. Congress has also considered draft legislation which would provide similar incentives to conduct audits. These measures have been vigorously opposed by the federal Environmental Protection Agency ("EPA") which has threatened to strip those states of their EPA enforcement powers and whose officials have testified on many occasions against the proposed federal legislation. At the same time, however, the EPA has issued a series of audit policies to encourage corporations to conduct audits. The result has been added uncertainty as to whether corporations should or should not conduct formal internal reviews of the status of their environmental law compliance.

Within the last few years, another area of federal regulatory activity -- occupational safety and health ("OSH") -- has entered the audit privilege debate. Various forms of audit privileges and other incentives for corporations to conduct internal compliance reviews have appeared in certain of the Occupational Safety and Health Administration ("OSHA") reform and reinvention initiatives. At this time, it is not clear what form audit privileges or immunities will take in the occupational safety and health area.

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This article will describe the current application of the audit privilege to environmental audits and OSH audits. The article will then make recommendations for the future of OSH audits based upon the lessons learned from the experience to date with the various initiatives in place or being considered to encourage voluntary environmental compliance auditing.

I. WHAT ARE ENVIRONMENTAL OR OCCUPATIONAL SAFETY AND HEALTH AUDITS?

Environmental or OSH audits, as the terms are used in this article, are internal reviews voluntarily conducted by companies to measure their compliance with laws and regulations.[1] The audits are often conducted by teams consisting of one or more technical experts, often outside consultants hired by the company for their independence as well as their expertise, company personnel, and sometimes in-house or outside counsel. The audit teams often use a variety of information-gathering and investigatory tools, including questionnaires, interviews, testing, and first-hand observation. Team members create a number of documents in the course of conducting the audit. The documents may include notes, diagrams, photographs, and ultimately an audit report that contains several sections. Certain sections contain predominately the findings of the auditors while other sections may contain analysis, opinions and recommendations. There may also be other documents created that are, in a sense, a product of the audit. These include notes, memoranda, or reports concerning activities taken to address any deficiencies noted in the audit report.

II. WHY SHOULD AUDITS BE PROTECTED AND ENCOURAGED?

The audit privilege[2] has been recognized in certain federal and

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[1] *See generally*, Michael Ray Harris, *Promoting Corporate Self-Compliance: An Examination of the Debate over Legal Protection for Environmental Audits*, 23 ECOLOGY L.Q. 663, 666, 705 (1996).

[2] There are various names for the privilege, including the following: self-critical subjective analysis privilege, *In re* Burlington N., 679 F.2d 762, 765 (8th Cir. 1982); peer review privilege, Pagano v. Oroville Hosp., 145 F.R.D. 683, 690 (E.D. Cal. 1993); self-evaluation privilege, Hoffman v. United Telecomm., Inc., 117 F.R.D. 440, 442 (D. Kan. 1987); privilege for confidential self-evaluative analysis, Westmoreland v. CBS, Inc., 97 F.R.D. 703, 705-06 (S.D.N.Y. 1983); self-examination privilege, Rosario v. New York Times Co., 84 F.R.D. 626, 631 (S.D.N.Y. 1979); "privilege against disclosure of self-evaluative documents," Emerson Elec. Co. v. Schlesinger, 609 F.2d 898, 907 (8th Cir. 1979); qualified privilege for self-evaluative documents, Reynolds Metals Co. v. Rumsfeld, 564 F.2d 663, 667 (4th Cir. 1977), *cert. denied*, 435 U.S. 995 (1978); privilege of self-critical analysis, Webb v. Westinghouse Elec. Corp., 81 F.R.D. 431, 433 (E.D. Pa. 1978); self-

state courts and enacted in certain state statutes to encourage corporations to conduct self-evaluations in areas in which there is a strong public interest that honest evaluations be performed, effective recommendations for improvement in performance or compliance be made to management, and, in some instances, good faith reporting of regulatory violations be made to the appropriate government agency. The need for the privilege is based on the concern that if the products of audits were discoverable in court actions or used in investigations against the company, there would be such a disincentive to perform the audits that it would outweigh any benefit to the corporation in conducting the audits. The risk of adverse use against the corporation of any revelations the audits may contain would simply overwhelm any interest in conducting the audits.[3]

Courts have noted, however, that unlike certain other evidentiary privileges, such as the attorney-client privilege, the audit privilege exists to support a public interest, not any private interest of the one conducting the audit.[4] Therefore, in any litigation concerning whether there should be such a privilege for the materials in question, the justification for the privilege must be based on a public interest in having honest and thorough audits of this nature conducted and documented, rather than on any interest solely held by the corporation seeking to assert the privilege.

In theory, an audit privilege may be invoked to protect discovery of audit materials in a variety of types of court actions including civil actions between private parties or between a private party and a government entity;[5] government agency civil enforcement actions against private entities;[6] and criminal actions.[7] Within these different types of

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critical privilege, United States v. Dexter Corp., 132 F.R.D. 8, 9 (D. Conn. 1990). For simplicity's sake, this article will use the short term "audit privilege."

[3] A 1995 survey by Price Waterhouse contains data confirming this. Although 75 percent of those responding to the survey indicated that they conducted environmental audits, the survey showed that "'there is still a perceived reluctance to expand audit programs, in the face of possible enforcement.'" *Hearings on H.R. 1047 before the Subcomm. on Commercial and Administrative Law of the Comm. on the Judiciary of the House of Representatives*, 104th Cong., 1st Sess., Serial No. 88, June 29, 1995 at 267-68 (1995) (reprint of Price Waterhouse News Release, April 6, 1995).

[4] *See* Warren v. Legg Mason Wood Walker, Inc., 896 F. Supp. 540, 543 (E.D.N.C. 1995), "It must be remembered that the self-critical analysis privilege exists out of concern for the public and is not personal to the one asserting the privilege," (citing Todd v. South Jersey Hosp. Sys., 152 F.R.D. 676 (D.N.J. 1993).

[5] *See, e.g.*, Wiener v. NEC Electronics, Inc., 848 F. Supp. 124, 129 n.2 (N.D. Cal. 1994) (documents provided to government for use in antidumping investigation sought in patent infringement action); Torres v. Kuzniasz, 936 F. Supp. 1201, 1205 (D.N.J. 1996) (plaintiffs seek police department internal investigation reports in action pursuant to 42 U.S.C. § 1983).

[6] *See, e.g.*, Reich v. Hercules, Inc., 857 F. Supp. 367, 368-69 (D.N.J. 1994).

[7] *See, e.g., In re* Grand Jury Proceedings, 861 F. Supp. 386, 386 (D. Md. 1994).

actions the audit materials may be sought from the defendant company that caused the audit to be performed or from the government entity that received the audit materials from the company or from an independent entity that was hired to conduct the audit. Thus, there are a myriad of possible scenarios in which an audit privilege may be invoked.

Added to this complexity is the wide variety of items that may be considered to be "audit materials." The materials to be protected by the privilege could conceivably include anything that was created in the audit process. Examples could be notes of the audit team members, photographs, drawings, diagrams, drafts of the audit report, the final audit report itself, and possibly a follow-up report or memorandum discussing efforts to correct any deficiencies documented in the audit report. It is important to note at the outset, however, that while all these items, and more, could be considered to be "audit materials" what might actually be protected by the audit privilege as interpreted by a court or provided by a statute could be substantially less than all these items.

III. THE COMMON LAW AUDIT PRIVILEGE

A. General Principles

Courts have neither consistently defined nor predictably applied the audit privilege.[8] There is even disagreement among the courts as to whether such a privilege should be recognized at all. This is due to the stated reluctance of the courts to create new privileges or to expand existing privileges. It may also be due to the wide variety of circumstances in which the audit privilege is sought to be applied.

In the federal courts, privileges against discovery of certain materials and communications are recognized pursuant to Rule 26 of the Federal Rules of Civil Procedure and Rule 501 of the Federal Rules of Evidence. Rule 26 of the Federal Rules of Civil Procedure provides that there shall not be discovery of privileged communications, documents, and other materials.[9] Rule 501 of the Federal Rules of Evidence states that, subject to certain exceptions such as Congress' enacting a statute recognizing a privilege, evidentiary privileges shall be created and

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[8] Many courts have noted that the audit privilege has "remained largely undefined." Etienne v. Mitre Corp., 146 F.R.D. 145, 147 (E.D. Va. 1993). *Accord* Reichhold Chemicals, Inc. v. Textron, Inc., 157 F.R.D. 522, 526 (N.D. Fla. 1994) ("[T]he self-critical analysis privilege has been developed on an ad hoc basis, and the scope of the privilege has varied greatly.").

[9] FED. R. CIV. P. 26(b)(1) ("Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action."). *See also* United States v. Dexter Corp., 132 F.R.D. 8, 8-9 (D. Conn. 1990).

interpreted in the common law.[10] Therefore, evidentiary privileges have not been created expressly in the Federal Rules of Evidence. Rather, those rules provide that privileges will be created and interpreted by Congress and the courts.

Although they are given the power to do so in Rule 501, the federal courts are reluctant to create new privileges or to apply existing privileges in broad ways.[11] In spite of this general reluctance, the federal courts have created certain privileges against discovery where the balance of interests favored recognition of a privilege. Among the privileges that federal courts have created are the attorney-client privilege;[12] the physician-patient privilege;[13] the informant's privilege;[14] the spousal privilege;[15] and the governmental deliberative process privilege.[16]

The first case to recognize an audit privilege was decided in 1970.[17] In *Bredice v. Doctors Hospital, Inc.*, the court announced that a privilege would apply to protect a hospital peer review report from discovery.[18] Since that case, federal courts have applied an audit privilege to a number of specific types of audit materials including those at issue in such diverse cases as those arising under securities law[19] and

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[10] FED. R. EVID. 501 provides, in pertinent part:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

[11] *See* University of Pennsylvania v. EEOC, 493 U.S. 182, 189 (1990) (noting that "[w]e do not create and apply an evidentiary privilege unless it 'promotes sufficiently important interests to outweigh the need for probative evidence." (quoting Trammel v. United States, 445 U.S. 40, 51 (1980)); United States v. Nixon, 418 U.S. 683, 710 (1974) (stating that privileges are "not lightly created nor expansively construed, for they are in derogation of the search for truth"); United States v. Southern Bell Telephone and Telegraph Co., 915 F. Supp. 308, 311 (N.D. Fla. 1996) (stating that the first consideration in deciding whether to create a new privilege under Fed. R. Evid. 501 is whether Congress has already considered the issue and declined to create a statutory privilege).

[12] Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

[13] Hardy v. Riser, 309 F. Supp. 1234, 1238 (N.D. Miss. 1970).

[14] Pilar v. Steamship Hess Petrol, 55 F.R.D. 159, 162-163 (D. Md. 1972).

[15] Wolfle v. United States, 291 U.S. 7, 14 (1934).

[16] Resident Advisory Bd. v. Rizzo, 97 F.R.D. 749, 751 (E.D. Pa. 1983).

[17] Bredice v. Doctors Hosp., Inc., 50 F.R.D. 249 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973).

[18] 50 F.R.D. at 250-51.

[19] *See, e.g., In re* Crazy Eddie Secs. Litig., 792 F. Supp. 197, 205 (E.D.N.Y. 1992); New York Stock Exchange, Inc. v. Sloan, 22 Fed. R. Serv. 2d (Callaghan) 500 (S.D.N.Y. 1976).

employment law.[20] Courts have also recognized audit privileges in academic and medical peer review contexts,[21] in cases concerning product safety assessments,[22] and in railroad accident cases.[23]

More often, however, courts deny a motion that audit material be protected by an audit privilege. In a number of cases, courts have questioned or declined to find that such a privilege even exists.[24] In other cases, courts deny the privilege based on the type of audit involved or other particular circumstances of the case.[25]

Even when courts do state that a privilege may or does exist, courts often will so narrowly construe the privilege that it will not be

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[20] *See, e.g.*, O'Connor v. Chrysler Corp., 86 F.R.D. 211, 218 (D. Mass. 1980) (protecting from discovery in an action under Title VII sections of a personnel policy containing self-evaluation); Jamison v. Storer Broad. Co., 511 F. Supp. 1286, 1296 (E.D. Mich. 1981) (protecting affirmative action plan from discovery), *aff'd in part, rev'd in part on other grounds*, 830 F.2d 194 (6th Cir. 1987); Sheppard v. Consolidated Edison Co., 893 F. Supp. 6, 8 (E.D.N.Y. 1995) (finding that affirmative action plan is privileged).

[21] *See, e.g.*, Scott v. McDonald, 70 F.R.D. 568, 572 (N.D. Ga. 1976); Morse v. Gerity, 520 F. Supp. 470 (D. Conn. 1981); Mewborn v. Heckler, 101 F.R.D. 691, 693 (D.D.C. 1984). The most widely accepted application today of the audit privilege is in cases concerning hospital self-evaluations and medical personnel peer reviews. See David Sorenson, Comment, *The U.S. Environmental Protection Agency's Recent Environmental Auditing Policy and Potential Conflict with State-Created Environmental Audit Privilege Laws*, 9 TUL. ENVTL. L.J. 483, 491 (Summer 1993) (*citing In re* Grand Jury Proceedings, 861 F. Supp. 386, 387 (D. Md. 1994)).

[22] *See, e.g.*, Bradley v. Melroe Co., 141 F.R.D. 1, 2-3 (D.D.C. 1992).

[23] *See, e.g.*, Granger v. National R.R. Passenger Corp., 116 F.R.D. 507, 508 (E.D. Pa. 1987).

[24] *See, e.g.*, *In re* Grand Jury Proceedings, 861 F. Supp. 386, 387 (D. Md. 1994) (noting that courts are reluctant to recognize the audit privilege); Etienne v. Mitre Corp., 146 F.R.D. 145, 148 (E.D. Va. 1993) (stating that the Fourth Circuit does not recognize the audit privilege); Wright v. Patrolmen's Benevolent Ass'n, 72 F.R.D. 161, 164 (S.D.N.Y. 1976); Lloyd v. Cessna Aircraft Co., 74 F.R.D. 518, 521 (E.D. Tenn. 1977); *In re* Application of the New York Times Co., No. M8-85, 1984 U.S. Dist. LEXIS 22936, at *2 (S.D.N.Y. Oct. 9, 1984); *In re* Sahlen & Assocs., Inc., No. 89-6308-CIV, 1990 U.S. Dist. LEXIS 18793, at *2-3 (S.D. Fla. Nov. 5, 1990); T.W.A.R., Inc. v. Pacific Bell, 145 F.R.D. 105, 108 (N.D. Cal. 1992) (concluding that the Ninth Circuit has not recognized an audit privilege); Chemical Bank v. Affiliated FM Ins. Co., No. 87 Civ. 0150 (VLB), 1994 U.S. Dist. LEXIS 2956, at *3 (S.D.N.Y. Mar. 16, 1994) (expressing doubt that "the self-critical analysis privilege remains viable" after the Supreme Court's decision in University of Pennsylvania v. E.E.O.C., 493 U.S. 182, 189 (1990)).

[25] A number of courts have found that the privilege does not protect affirmative action plans which are required to be created under Title VII and federal regulations. *See, e.g.*, Witten v. A.H. Smith & Co., 100 F.R.D. 446, 452-54 (D. Md. 1984), *aff'd*, 785 F.2d 306 (4th Cir. 1986) (holding that the affirmative action plan was required pursuant to federal law, thus, it would not be chilling to submit the plan to discovery and that, in any event, there are other disincentives to their creation, including fear of reprisal for critiquing employer's compliance with federal employment law); Tharp v. Sivyer Steel Corp., 149 F.R.D. 177, 178, 182 (S.D. Iowa 1993); Martin v. Potomac Elec. Power Co., 58 Fair Empl. Prac. Cas. (BNA) 355 (D.D.C. 1990); Aramburu v. Boeing Co., 885 F. Supp. 1434, 1441 (D. Kan. 1995); Griffith v. Davis, 161 F.R.D. 687, 701 (C.D. Cal. 1995); Etienne v. Mitre Corp., 146 F.R.D. 145, 148 (E.D. Va. 1993); Frazier v. Southeastern Pa. Transp. Auth., Civ. A. No. 84-3004, 1988 U.S. Dist. LEXIS 12311, at *7-8 (E.D. Pa. Nov. 1, 1988); *see also* 41 C.F.R. § 1-12.811.

available given the particular facts in the case.[26] Because the decision to apply the privilege is made on a case-by-case basis and because the courts are so reluctant to grant the privilege, the result is that a consistent doctrine for application of the privilege across all categories of cases has not emerged.

B. Factors Generally Considered in Deciding Whether the Privilege Applies

In general, however, courts tend to consider four factors in deciding whether the materials in question will be privileged: (1) Whether the material sought to be discovered was the product of an internal self-examination by the corporation; (2) whether the corporation intended to and did keep the material confidential; (3) whether there is a strong public interest in encouraging such audits to be performed; and (4) whether there is a strong possibility that denial of the privilege will chill the performance of such audits in the future.[27] Each of these will be described in greater detail.

The first consideration is whether the material was the product of an internal audit conducted by the corporation. This question is more complicated than it appears because not everything that the corporation may consider to be an "audit" will necessarily satisfy this criteria.[28] Furthermore, some courts have found that purely investigatory inquiries and audits conducted in the normal course of business do not qualify for the privilege.[29] This factor alone excludes many audits that corporations would conduct as part of an established environmental compliance program or occupational safety and health program to determine levels of compliance and make recommendations for improved performance.

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[26] *See, e.g.*, Dowling v. American Hawaii Cruises, Inc., 971 F.2d 423 (9th Cir. 1992).

[27] *See* Peter A. Gish, *The Self-Critical Analysis Privilege and Environmental Audit Reports*, 25 ENVTL. L. 73, 80-82 (Winter 1995); Donald P. Vandegrift, Jr., *Legal Development: The Privilege of Self-Critical Analysis: A Survey of the Law*, 60 ALB. L. REV. 171, 187 (1996).

[28] The first consideration is whether the material in question meets the court's definition of "audit." There are numerous definitions of "audit" or "critical self-evaluation" that a court may consider in determining whether the material in question qualifies for the privilege. *See* Gish, supra note 27, at 81 n.40. In addition to the various definitions provided by commentators and the courts, the EPA has put forth its own definition: "[An environmental audit is] a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements." EPA, Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. 66,706, 66,710 (Dec. 22, 1995).

[29] *See, e.g.*, Davidson v. Light, 79 F.R.D. 137, 139-40 (D. Colo. 1978) (finding that examination was investigatory); Dowling v. American Hawaii Cruises, Inc., 971 F.2d 423, 426 (9th Cir. 1992) (finding that minutes of safety committee meeting are not privileged because the meeting was conducted in the normal course of business).

Another limitation arising under this first factor is that only opinions and subjective impressions will be protected by the privilege, not facts.[30] Therefore, portions of an audit report and notes of members of the audit team that only contain facts may be discoverable, while the portions containing the teams' analysis and opinions formed based on those facts may be privileged. A court may order that a redacted version of such materials be provided to the requesting party.

The second factor, confidentiality, is as critical for the common law audit privilege as it is for other common law privileges, such as the attorney/client privilege. Courts will not protect an audit report from disclosure if the corporation has not limited distribution of the report.[31] The privilege will be considered to have been waived if the report is widely available to persons within or without the corporation, without effort to maintain a "need-to-know" limitation on distribution. Likewise, the privilege will be waived if previously confidential information in the report is otherwise revealed in discovery, such as in a deposition.[32]

The third and fourth factors are based upon the underlying policy supporting the audit privilege, namely that there must be a strong public interest in encouraging the type of audit at issue to be conducted and that there is a strong possibility that requiring disclosure would discourage future audits. Stated another way, in order for the privilege to apply, the purpose of the audit must be to examine a subject concerning which the public has a strong interest and there must be an overwhelming likelihood that such an audit would be chilled by disclosure.

Courts have found a strong public interest in audits being conducted in subjects such as health care,[33] employment discrimination,[34] and public safety.[35] Environmental pollution also appears to fit this

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[30] *See, e.g.*, In re Crazy Eddie Securities Litigation, 792 F. Supp. 197, 205 (E.D.N.Y. 1992); Price v. County of San Diego, 165 F.R.D. 614, 619 (S.D. Cal. 1996); Sheppard v. Consolidated Edison Co., 893 F. Supp. 6, 7 (E.D.N.Y. 1995); Webb. v. Westinghouse Elec. Corp., 81 F.R.D. 431, 433-34 (E.D. Pa. 1978); Jamison v. Storer Broadcasting Co., 511 F. Supp. 1286, 1296-97 (E.D. Mich. 1981); Mazzella v. RCA Global Communications, No. 83-3716 (WCC), 1984 U.S. Dist. LEXIS 18166, at *12 (S.D.N.Y. Mar. 28, 1984); O'Connor v. Chrysler Corp., 86 F.R.D. 211, 217-18 (D. Mass. 1980); Banks v. Lockheed-Georgia Co., 53 F.R.D. 283, 285 (N.D. Ga. 1971).

[31] *See, e.g.*, Peterson v. Chesapeake & Ohio Ry. Co., 112 F.R.D. 360, 363 (W.D. Mich. 1986); Westmoreland v. CBS, Inc., 97 F.R.D. 703, 706 (S.D.N.Y. 1983).

[32] *See, e.g.*, Peterson, 112 F.R.D. at 363 (noting that the information was revealed by a deposition witness).

[33] *See, e.g.*, Gilman v. United States, 53 F.R.D. 316, 318 (S.D.N.Y. 1971).

[34] *See, e.g.*, Stevenson v. General Elec. Co., 18 Empl. Prac. Dec. (CCH) P 8777 (S.D. Ohio 1978).

[35] *See, e.g.*, Kott v. Perini, 283 F. Supp. 1, 2 (N.D. Ohio 1968).

criteria.[36] Occupational safety and health should fall into that category also. Such a conclusion is not a given for every category of materials, however. There are cases in which courts have found that the subject matter of the audit at issue did not further a strong public interest.[37]

On the other hand, there are many cases where the subject was certainly one in which there was a strong public interest, but the courts denied the privilege because disclosure was not likely to have a chilling effect on conducting such audits in the future. The courts concluded that the party conducting the audit had such a compelling reason to conduct the audit, such as a regulatory requirement to conduct an audit or the need to investigate the cause of an accident, that no privilege was needed to encourage auditing and mandating disclosure would not overcome the reason to conduct the audit.[38] In the environmental law context, some courts have found that disclosure of audit material would not have a chilling effect because corporations have such a strong incentive to monitor their own compliance to avoid suffering civil or criminal penalties.[39]

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[36] One court has noted that there is a strong public interest in corporations' identifying sources of pollution. Reichhold Chemicals, Inc. v. Textron, Inc., 157 F.R.D. 522, 526 (N.D. Fla. 1994) ("As applied to the facts of this case, it is self-evident that pollution poses a serious public health risk, and that there is a strong public interest in promoting the voluntary identification and remediation of industrial pollution.").

[37] *See, e.g., In re* Salomon Inc. Sec. Litig., No. 91 Civ. 5442 (RPP), No. 91 Civ. 5471, 1992 U.S. Dist. LEXIS 17280, at 12 (S.D.N.Y. Nov. 12, 1992) (finding that there is not an "overwhelming public interest" in encouraging self-evaluation of businesses).

[38] *See, e.g.*, Warren v. Legg Mason Wood Walker, Inc., 896 F. Supp. 540, 542-43 (E.D.N.C. 1995) (refusing to apply an audit privilege, in part, because the National Association of Securities Dealers required the audit to be conducted); Ott v. St. Luke Hosp. of Campbell County, Inc., 522 F. Supp. 706, 709-10 (E.D. Ky. 1981) (denying privilege for hospital peer review materials where committee's functions would not be hampered by discovery); Skibo v. City of N.Y., 109 F.R.D. 58, 63-4 (E.D.N.Y. 1985); *In re* Salomon, 1992 U.S. Dist. LEXIS 17280, at *11-12 (S.D.N.Y. Nov. 12, 1992) (finding that "[t]he economic efficiencies, the accuracy of financial reporting and the improvement of business standards achieved by internal auditing programs and management control studies are so integral to the success of a business that the free flow of information is not likely to be stemmed by the possibility of future disclosure"); Myers v. Uniroyal Chem. Co., No. 91-6716, 1992 U.S. Dist. LEXIS 6472, at *13 (E.D. Pa. May 5, 1992) (concluding that investigation of industrial accidents will not be chilled by disclosure of investigation report); Tharp v. Sivyer Steel Corp., 149 F.R.D. 177, 182 (S.D. Iowa 1993) ("[T]he court's [sic] doubts that permitting plaintiffs in employment discrimination actions from discovering such reports as affirmative action plans or other equal employment compliance documents will have a 'chilling' affect [sic] upon employers' self-evaluations or discourage employers from frank reflection in those reports required by the federal government.").

[39] *See* Koppers Company, Inc. v. Aetna Cas. and Surety Co., 847 F. Supp. 360, 364 (W.D. Pa. 1994), *rev'd* 98 F.3d 1440 (3d Cir. 1996) ("[W]e disagree that a corporation would face a Hobson's choice between due diligence and self-incrimination in the tightly-regulated environmental context, for that context requires strict attention to environmental affairs. We doubt that today potential polluters will violate regulations requiring environmental diligence for fear of these documents being used against them tomorrow."); Louisiana Environmental Action Network, Inc. v. Evans Indus., Inc., No. 95-3002 section "K", 1996 U.S. Dist. LEXIS 8117, at 7 (E.D. La.

C. Other Limitations on Application of the Privilege

In addition to the four factors described above, there are other limitations on application of the privilege. First, it is a qualified privilege. Even if the above factors are met, the privilege may still not apply if the party seeking discovery can show that it has a compelling need for the materials or that there are other extraordinary circumstances supporting discovery in the case.[40]

Second, the privilege may be inadvertently or voluntarily waived. If the party seeking to assert the privilege also attempts to use the materials at trial, the privilege is waived.[41] Furthermore, a party asserting the privilege on appeal must have raised the privilege in the case below or it may be deemed to have been waived.[42]

Third, in some cases courts have held that the privilege only applies to protect disclosure to non-governmental parties of reports that a government agency requires the corporation to create and retain.[43] This limitation is based on the rationale that it would be unfair for the government to require an audit report to be created, then make the report available to private parties to be used against the corporation, while there is no such unfairness where the corporation has voluntarily undertaken

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June 10, 1996) ("As correctly noted by the plaintiff, 'the consequences of failure to comply with state and federal environmental laws and regulations -- including the possibility of criminal sentences, substantial civil penalties, debarment from entering into government contracts and public disapproval -- make it essential that corporations constantly evaluate their compliance with those laws and regulations.'"). *But see* Reichhold Chemicals, Inc. v. Textron, Inc., 157 F.R.D. 522, 527 (N.D. Fla. 1994) (applying the self-evaluative privilege to retroactive evaluations).

[40] *See Reichhold Chemicals*, 157 F.R.D. at 527; Todd v. South Jersey Hosp. Sys., 152 F.R.D. 676, 683 (D.N.J. 1993); Gray v. Board of Higher Educ., New York, 692 F.2d 901, 908 (2d Cir. 1982) (concluding that academic peer review materials will not be privileged where plaintiff has a compelling need for the materials sought); Memorial Hosp. for McHenry County v. Shadur, 664 F.2d 1058, 1062-63 (7th Cir. 1981) (holding that no privilege will apply to shield medical peer review materials in an antitrust action because of plaintiff's compelling need for the information and the strong public interest in antitrust enforcement).

One court has opined that the public interest in learning of environmental pollution outweighs the public interest in such information being kept confidential to avoid chilling auditing activity. *Koppers*, 847 F. Supp. at 364-65. Another court applied a similar analysis in concluding that the public benefits from private enforcement of equal employment laws through private actions against employers. Tharp v. Sivyer Steel Corp., 149 F.R.D. 177, 183-84 (S.D. Iowa 1993).

[41] *See* Coates v. Johnson & Johnson, 756 F.2d 524, 552 (7th Cir. 1985).

[42] *See* First E. Corp. v. Mainwaring, 21 F.3d 465, 467 (D.C. Cir. 1994).

[43] *See, e.g.*, Roberts v. Carrier Corp., 107 F.R.D. 678, 684 (N.D. Ind. 1985) ("To be privileged, the materials must have been prepared for mandatory government reports."); Guardian Life Ins. Co. of Am. v. Service Corp. Int'l, 12 U.S. P. Q.2d (BNA) 1128 (E.D. Pa. Jan. 13, 1989); *Webb*, 81 F.R.D. at 433 (E.D. Pa. 1978); Resnick v. American Dental Ass'n, 95 F.R.D. 372, 374-5 (N.D. Ill. 1982).

the audit.[44]

A fourth and very significant limitation for environmental and OSH audits is that the privilege does not apply when the government is the party seeking discovery.[45] The rationale for this limitation goes back to the basis of the privilege which is to further a strong public interest, rather than to protect a private right. Courts rely on the notion that Congress has already decided that the public interest lies in supporting agency authority to enforce certain federal laws; therefore, the courts will not hinder federal agency efforts to obtain materials relevant to agency investigatory and enforcement activities.[46] This latter limitation is one of the reasons why there has been such interest on the part of the private sector in having state and federal legislatures create audit privileges in statutes rather than relying on the common law.

IV. OTHER PROTECTIONS THAT MAY APPLY: THE ATTORNEY/CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE

A. Attorney/Client Privilege

In addition to the common law audit privilege, companies occasionally also invoke the attorney/client privilege and the work product doctrine to protect audit reports from discovery or use in evidence. In general, these have proven to be even less satisfactory than the common law audit privilege in protecting audits. This is largely due to a mismatch between the purposes behind the attorney/client privilege and work product doctrine and the reason for conducting most internal audits.

The purpose behind the attorney/client privilege is to encourage honest and open communication and consultation between client and attorney.[47] The purpose behind the work product doctrine is to allow attorneys to produce analytical work in anticipation of litigation without fear of the opposition's discovery of the attorney's thoughts and

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[44] *Resnick*, 95 F.R.D. at 375; Hardy v. New York News Inc., 114 F.R.D. 633, 641 (S.D.N.Y. 1987).

[45] *See, e.g.*, University of Pa. v. EEOC, 493 U.S. 182, 189 (1989); FTC v. TRW, Inc., 628 F.2d 207, 210 (D.C. Cir. 1980); United States v. Noall, 587 F. 2d 123 (2d Cir. 1978) (holding that internal audit of tax practices is not privileged against discovery by the Internal Revenue Service); United States v. Dexter Corp., 132 F.R.D. 8, 9-10 (D. Conn. 1990) (denying privilege where EPA requested environmental audit report); *In re* Grand Jury Proceedings, 861 F. Supp. 386, 388 (D. Md. 1994); Reich v. Hercules, 857 F. Supp. 367, 371 (D.N.J. 1994); Hardy v. New York News, Inc., 114 F.R.D. 633, 643 (S.D.N.Y. 1987);.

[46] *See Reich*, 857 F. Supp. at 371; *Dexter*, 132 F.R.D. at 9.

[47] Upjohn v. United States, 449 U.S. 383, 389 (1981).

impressions.[48] The reason for conducting internal audits is not necessarily to receive legal advice or to prepare for litigation. Often, attorneys are not directly involved in the audit process at all. If they are, it may be solely to provide advice on interpreting regulatory requirements in light of a specific audit finding. Such advice would not necessarily be considered part of the audit process itself.

In spite of these limitations, there are situations in which the attorney/client privilege and the work product doctrine could apply. Knowing these in advance should influence decisions a company must make in how it will conduct its audit, in order to preserve the ability to rely on one of these protections should the need arise.

The following conditions must be met for the attorney/client privilege to apply:

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.[49]

To summarize these elements, the question for determining whether the attorney/client privilege applies to an audit is whether there was a confidential communication between an attorney and client which was made for the purpose of obtaining legal advice.

This is an absolute privilege that cannot be overcome by a showing of need by the party requesting the privileged information.[50] The privilege, however, only protects the attorney/client communication itself. Underlying facts are not protected by virtue of their having been

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[48] Hickman v. Taylor, 329 U.S. 495, 511 (1947).

[49] United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950). For a thorough review of the attorney-client privilege, see PAUL R. RICE ET AL., ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES (1993).

[50] *See* Admiral Ins. Co. v. United States Dist. Ct., 881 F.2d 1486, 1493-95 (9th Cir. 1989).

the subject of an attorney/client communication.[51] Therefore, facts or materials do not become privileged simply by being conveyed to an attorney, and only materials and communications containing legal advice may be privileged.[52]

Given these basic rules, there are several reasons why the attorney/client privilege often is found not to apply to audits.[53] The first reason is that the purpose of an audit is usually primarily to obtain non-legal recommendations. If an attorney is involved in the audit process, the attorney may be serving more as a business advisor than a legal advisor.[54] The purpose of the audit and the attorney's participation may be more to improve cost efficiency in environmental or OSH programs than to obtain legal advice. If this is so, then the privilege may not apply.[55]

Another reason why the attorney/client privilege may not apply to an environmental or OSH audit is that the audit may not meet the confidentiality requirements of the privilege. The distribution of the audit report may not be appropriately limited to preserve the privilege. Furthermore, the composition of the audit team itself may include outside experts and others whose participation is not related to assisting the attorney in providing legal assistance. Outside consultants are often used to conduct or review an audit. An outside consultant's participation will destroy the confidentiality of the communication unless the consultant is an agent of the attorney or the client.[56] To be an agent of the attorney, the consultant should be hired by the attorney or at the

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[51] *See* Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 602 (8th Cir. 1977).

[52] *See Diversified Indus.*, 572 F.2d at 602; Wonneman v. Stratford Secs. Co., 23 F.R.D. 281, 285 (S.D.N.Y. 1959).

[53] *See, e.g.*, McGuire v. Sigma Coatings, Inc., 48 F.3d 902, 903-04 (5th Cir. 1995); Arkwright Mut. Ins. Co. v. National Union Fire Ins. Co., No. 90 Civ. 7811 (KC), 1993 U.S. Dist. LEXIS 174, at *9-10 (S.D.N.Y. Jan. 11, 1993); United States v. Chevron U.S.A. Inc., No. 88-6681, 1989 U.S. Dist. LEXIS 12267, at *16 (E.D. Pa. Oct. 16, 1989); *In re* Grand Jury Matter, 147 F.R.D. 82, 84-86 (E.D. Pa. 1992); *See generally*, Donald P. Vandegrift, Jr., *Legal Development: The Privilege of Self-Critical Analysis: A Survey of the Law*, 60 ALB. L. REV. 171, 192 (1996); Harris, *supra* note 1, at 686-88; David Sorenson, Comment, *The U.S. Environmental Protection Agency's Recent Environmental Auditing Policy and Potential Conflict with State-Created Environmental Audit Privilege Laws*, 9 TUL. ENVTL. L.J. 483, 490-91 (Summer 1993). *But see* Olen Properties Corp. v. Sheldahl, Inc., No. CV 91-6446-WDK (MCX), 1994 U.S. Dist. LEXIS 7125 (C.D. Cal. April 12, 1994).

[54] *See* United States v. Chevron, U.S.A., No. 88-6681, 1989 U.S. Dist. LEXIS 12267, at *16-18 (E.D. Pa. Oct. 16, 1989); Eutectic Corp. v. Metco Inc., 61 F.R.D. 35, 38-39 (E.D.N.Y. 1973).

[55] *See* United States v. Chevron, U.S.A., 1989 U.S. Dist. LEXIS 12267, at *16-18 (E.D. Pa. Oct. 16, 1989).

[56] See Resnick v. American Dental Ass'n, 95 F.R.D. 372, 375 (N.D. Ill. 1982); In re Grand Jury Matter, 147 F.R.D. 82, 84-86 (E.D. Pa. 1992).

attorney's direction.[57] The consultant also must work under the supervision of the attorney.[58] To be an agent of the client, the consultant must be communicating with the attorney on the client's behalf for the purpose of obtaining legal advice for the client.[59]

The attorney does not necessarily have to be a direct party to a communication for the privilege to apply. If an agent of the attorney is party to a communication with the client, the privilege may apply. An employee of the client could act as an agent of the attorney, as could an outside expert working under the direction of the attorney.[60] Therefore, the attorney does not necessarily have to conduct the investigation, for example, but the investigation has to be performed at least by an agent of the attorney for the purpose of obtaining legal advice from the attorney.

For all these reasons, courts usually find that the attorney/client privilege does not apply to protect audits under facts and circumstances similar to those that arise concerning environmental and OSH audits. In most cases where the attorney/client privilege is invoked the defendant also invokes the work product doctrine.

B. Work Product Doctrine

Another possible protection for audit reports is the work product doctrine. This rule protects documents prepared by an attorney in anticipation of litigation.[61] This is a qualified protection that may be overcome upon a showing of "substantial need" and an inability to obtain equivalent materials without incurring "undue hardship."[62]

Like the attorney/client privilege, the work product doctrine in most circumstances will not apply to protect environmental or OSH audits. One reason for this is that the audits are not often prepared "in anticipation of litigation." It may be argued, of course, that they are being prepared with the idea of avoiding litigation in the future, but courts have held that the litigation contemplated must be more than a remote possibility.[63] The litigation does not actually have to have begun,

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[57] United States v. Brown, 349 F. Supp. 420, 426 (N.D. Ill. 1972), *modified* 478 F.2d 1038.

[58] Baxter Travenol Labs, Inc. v. Abbott Labs, No. 84 C 5103, 1987 U.S. Dist. LEXIS 10300, at *34 (N.D. Ill. June 19, 1987).

[59] *In re* Grand Jury Proceedings Under Seal, 947 F.2d 1188, 1190-91 (4th Cir. 1991).

[60] *In re* Alexander Grant & Co. Litigation, 110 F.R.D. 545, 547 (S.D. Fla. 1986).

[61] Hickman v. Taylor, 329 U.S. 495, 510-11 (1947); FED. R. CIV. P. 26(b)(3); *see also* FED. R. CIV. P. 26(b)(3) Advisory Committee's notes.

[62] FED. R. CIV. P. 26(b)(3).

[63] *See* Garfinkle v. Arcata Nat'l Corp., 64 F.R.D. 688, 690 (1974).

however. Most audits occur in what would be called the "ordinary course of business." This would not qualify for work product doctrine protection.[64]

Another reason the doctrine may not apply is that it is meant to protect the mental impressions and conclusions of attorneys from disclosure. Much of what a company may want to protect in an audit report may not consist of attorney opinion.[65] Facts are not protected, nor are the opinions of non-attorney participants in the audit team.[66]

The right to assert this doctrine also may be voluntarily or involuntarily waived by the client.[67] One example of waiver might be voluntary disclosure of audit documents to the government.[68]

Thus, as with the attorney/client privilege, the criteria that must be met for the work product doctrine to apply are often absent in audit cases. Furthermore, in certain respects the work product doctrine would not go far enough to provide the scope of protection a company may want for its audit information.

V. LEGISLATING ENVIRONMENTAL AND OSH AUDIT PROTECTION AND IMMUNITIES

A. State Legislation

In response to the reluctance of the courts to apply the audit privilege to environmental and safety and health audits, there have been efforts at the federal and state levels to create statutory audit privileges.[69] This section will describe those efforts.

State privilege law, whether common law or statutory law, applies in actions in federal courts only when "state law provides the rule

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[64] Portions of audits performed after an accident, as part of an investigation into causation, may be considered attorney work product since they would arguably be performed in anticipation of litigation concerning the accident. *See* Smith v. United States, No. 87-883-FR, 1988 U.S. Dist. LEXIS 4547, at *6-7 (May 9, 1988).

[65] *But see* Waste Management Inc. v. Florida Power & Light Co., 571 So.2d 507, 510 (Fla. App. 2 Dist. 1990) (protecting photographs that attorney directed be taken).

[66] Hickman v. Taylor, 329 U.S. 495, 511 (1947).

[67] United States v. Nobles, 422 U.S. 225, 239 (1975).

[68] *But see* Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1427-31 (3d Cir. 1991).

[69] A large number of states have enacted laws protecting hospital self-evaluations and medical peer review evaluations. *See, e.g.*, GA. CODE ANN. § 31-7-143 (1991); HAW. REV. STAT. § 624-25.5 (1992); NEB. REV. STAT. § 71-2048 (1990); WIS. STAT. ANN. § 146.38 (West 1993-1994).

of decision," as in federal diversity suits.[70] Where, however, an action in federal court contains only federal claims or both federal and state claims, federal privilege law will govern.[71] Therefore, in citizen suits under federal environmental laws, federal privilege law will govern,[72] whereas in toxic tort actions brought in federal courts under diversity jurisdiction state privilege law will govern, as it would for suits brought in state courts.

A number of states have enacted laws providing an environmental audit privilege to companies under certain conditions.[73] In general, there are two approaches that these states have taken to provide incentives for companies to audit.[74] One approach is to shield audit reports from discovery and use in any stage of an administrative, civil or criminal action.[75] This approach most resembles a true evidentiary privilege, except that in order to receive the statutory protection the company must take reasonably diligent action to report and abate the violation. Oregon's law, which was the first state

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[70] FED. R. EVID. 501; *see also* Pkfinans Int'l Corp. v. IBJ Schroder Leasing Corp., No. 93 Civ. 5375 (SAS), 1996 U.S. Dist. LEXIS 17375, at *6 n.7 (S.D.N.Y. Nov. 21, 1996).

[71] Von Bulow by Auersperg v. Von Bulow, 811 F.2d 136, 141 (2d Cir. 1987).

[72] Citizen suits are civil actions brought by private citizens to enforce certain environmental laws. *See* Federal Water Pollution Control Act, 33 U.S.C. § 1365 (1996); Clean Air Act, 42 U.S.C. § 7604 (1996); Safe Water Drinking Act, 42 U.S.C. § 6972 (1996); Toxic Substances Control Act, 15 U.S.C. § 2619 (1996); Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1415(g) (1996); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9659 (1996).

[73] As of 1997, twenty-three states had enacted legislation providing some form of audit privilege or immunity for companies that conducted environmental audits. They are Alaska, Arkansas, Colorado, Idaho, Illinois, Indiana, Kansas, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nevada, New Hampshire, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, and Wyoming. 1997 Alaska. Sess. Laws 29; ARK. CODE ANN. §§ 8-1-301 to -312 (Michie 1996); COL. REV. STAT. ANN. §§ 13-25-126.5, 13-90-107(j)(I)(A) (West 1995); IDAHO CODE § 9-340 (1996); ILL. REV. STAT. ch. 415, para. 5/52.2 (1997); IND. CODE ANN. §§ 13-28-4-1 to -5, 4-20.5-7-5, 13-11-2-68 to 69 (1997); KAN. STAT. ANN. § 60-3332 (1996); KY. REV. STAT. ANN. §§ 224.01-040 (Michie 1996); MICH. COMP. LAWS ANN. §§ 324.14801-.14810 (West 1996); 1995 Minn. Laws 168; MISS. CODE ANN. § 49-2-71 (1997); 1997 Mont. Laws 534; 1997 Nev. Stat. 297; N.H. REV. STAT. ANN. § 147-E:1 (Michie 1996), repealed by 1996, 4:4, effective July 1, 2002; OHIO REV. CODE ANN. §§ 3745.70-.72 (Anderson 1997); OR. REV. STAT. § 468.963 (1996), as amended by House Bill 3571, enacted June 16, 1997; 1997 R.I. Publ Laws 196; S.C. CODE ANN. §§ 48-57-10 to -40 (Law. Co-op. 1996); S.D. CODIFIED LAWS ANN. §§ 1-40-33 to -36 (1997); 1995 Tex. Gen. Laws 219; UTAH CODE ANN. §§ 19-7-103 to 19-7-107 (1996); VA. CODE ANN. § 10-1-1198 (1997); WYO. STAT. §§ 35-11-1105 to 35-11-1106 (1997).

[74] *See* Mia Anna Mazza, Comment, *The New Evidentiary Privilege for Environmental Audit Reports: Making the Worst of a Bad Situation*, 23 ECOLOGY L.Q. 79, 82 n.12 (1996); Sorenson, *supra* note 53, at 493.

[75] *See supra*, note 74. An example of such a law is Oregon's audit privilege statute which provides that "an Environmental Audit Report shall be privileged and shall not be admissible as evidence in any legal action in any civil, criminal or administrative proceeding." OR. REV. STAT. § 468.963 (1996), as amended by House Bill 3571, enacted June 16, 1997.

environmental audit law, takes this approach.[76]

The second approach is to provide some level of immunity for violations found by an audit and promptly reported to the appropriate government agency.[77] Colorado's law does this.[78]

Some of the statutes also go beyond the common law in other ways. For example, the laws protect not only analysis and opinions, but also facts.[79] Certain state statutes also contain a testimonial privilege as well as protection for written materials.[80]

The federal EPA has adamantly opposed these state statutes on the grounds that they interfere with enforcement of environmental laws, deprive the public of information, lead to increased litigation over interpretation of the law, and are unnecessary to encourage companies to conduct audits.[81] The EPA has even threatened to revoke states' authorization to enforce federal environmental laws if those states pass audit privilege statutes.[82]

B. Federal Legislation

1. Environmental Audit Bills

While many states have passed environmental audit privilege or immunity statutes, Congress has not yet done so. One bill introduced in 1994 and two bills introduced in 1995 would have provided an evidentiary audit privilege to shield environmental audit information from discovery and use in any civil, criminal or administrative proceeding, as long as certain conditions were met.[83]

S. 2371, S. 582, and H.R. 1047 were similar to the Oregon audit privilege statute in that they provided a broad privilege for audit

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[76] OR. REV. STAT. § 468.963 (1996), as amended by House Bill 3571, enacted June 16, 1997.

[77] *See supra* note 74.

[78] COL. REV. STAT. ANN. §§ 13-25-126.5, 13-90-107(j)(I)(A) (West 1995).

[79] OR. REV. STAT. § 468.963 (1996), as amended by House Bill 3571, enacted June 16, 1997; *see also* Mazza, *supra* note 74, at 104.

[80] *See, e.g.*, COLO. REV. STAT. ANN. § 13-90-107(1)(j)(I)(A).

[81] EPA, Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. 66705, 66710 (1995).

[82] *See Colorado and Ohio Accused of Skirting Federal Environmental Laws*, N.Y. TIMES, Jan. 30, 1997, at B7.

[83] Environmental Audit Protection Act, S. 2371, 103d Cong., 2d Sess. (1994); Voluntary Environmental Self-Evaluation Act, H.R. 1047, 104th Cong., 1st Sess. (1995); Voluntary Environmental Audit Protection Act, S. 582, 104th Cong., 1st Sess. (1995).

reports.[84] Under the provisions in these three bills, these protections would be available only for audits that were voluntarily conducted and only if the company took prompt action to come into compliance.[85] S.

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[84] S. 582 provided that:

> an environmental audit report prepared in good faith by a person or government entity related to, and essentially constituting a part of, an environmental audit shall not be subject to discovery and shall not be admitted into evidence in any civil or criminal action or administrative proceeding before a Federal court or agency or under Federal law.

S. 582, § 3801(a)(1). S. 2371 contained a very similar provision. S. 2371, § 4. S. 582 contained the following definition of "Environmental Audit Report:"

> The term 'environmental audit report' means any reports, findings, opinions, field notes, records of observations, suggestions, conclusions, drafts, memoranda, drawings, computer generated or electronically recorded information, maps, charts, graphs, surveys, or other communications associated with an environmental audit.

S. 582, § 3804(3). H.R. 1047 provided basically the same protection, with the following language:

> . . . a report, finding, opinion, or other communication of a person or entity related to, and essentially constituting a part of, a voluntary environmental self-evaluation that is made in good faith shall not be admissible evidence in any legal action or administrative procedure under Federal law and shall not be subject to any discovery procedure under Federal law. . . .

H.R. 1047, § 4(a). H.R. 1047 defined "Voluntary Environmental Self-Evaluation" as:

> . . . an assessment, audit, investigation or review that is --
> (A) initiated by a person or entity;
> (B) carried out by the person or entity, or a consultant employed by the person or entity, for the express purpose of carrying out the assessment, audit or review; and
> (C) carried out to determine whether the person or entity is in compliance with Federal environmental laws (including any permit issued under a Federal environmental law).

H.R. 1047, § 3(6).

[85] S. 2371, § 4. S. 582 provided that, among other limitations, the protections would not apply if the information were required to be reported to a regulatory agency under federal law (thus, the audit must be voluntary) or if:

> (i) the environmental audit report provides evidence of noncompliance with a covered Federal law; and
> (ii) appropriate efforts to achieve compliance were not promptly initiated and pursued with reasonable diligence; . . .

S. 582, § 3801(2)-(3). H.R. 1047 contained similar limitations, in that the audit had to be "voluntary" and the protections would not apply unless:

> (i) the report, finding, opinion, or other communication indicates noncompliance with a Federal environmental law; and
> (ii) the person or entity failed to initiate efforts to achieve compliance with the law within a period of time that is reasonable and that is adequate to achieve compliance (including submitting an appropriate permit application); . . .

H.R. 1047, § 4(a)(2)(A), (b). In addition, that bill also contained an exception to the protection for situations in which:

> (B) compelling circumstances --
> (i) make it necessary to admit the environmental audit report,

582 and H.R. 1047 also contained testimonial privileges concerning audit information.[86] Furthermore, since the protections were to apply to an "audit report," the protections would have extended to facts as well as opinions in the report.[87]

In addition to the protection from discovery and admission into evidence, H.R. 1047 and S. 582 also would have provided immunity from administrative, civil or criminal penalties for violations that were "voluntarily disclosed" to the EPA, much like the Colorado statute.[88] Thus, the bills took both the privilege and the immunity approaches

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finding, opinion, or other communication into evidence; or
(ii) necessitate that the environmental audit report, finding, opinion, or other communication be subject to discovery procedures; . . .

H.R. 1047, § 4.

[86] S. 582, § 3802; H.R. 1047, § 5.

[87] See the definition of "Environmental Audit Report", *supra* note 85.

[88] Section 6 of H.R. 1047 provided:

(a) IN GENERAL - The disclosure of information relating to a Federal environmental law to the appropriate official of a Federal or State agency responsible for administering a Federal environmental law shall be considered to be a voluntary disclosure if --
(1) the disclosure of information arises out of a voluntary environmental self-evaluation;
(2) the person or entity that initiates the self-evaluation --
(A) ensures that the disclosure is made promptly after receiving knowledge of the information referred to in paragraph (1); and
(B) initiates an action to address the issues identified in the disclosure --
(i) within a reasonable period of time after receiving knowledge of the information; and
(ii) within a period of time that is adequate to achieve compliance with the requirements of the Federal environmental law that is the subject of the action (including submitting an application for an applicable permit); and
(3) the person or entity that makes the disclosure provides any further relevant information requested, as a result of the disclosure, by the appropriate official of the Federal or State agency responsible for administering the Federal environmental law.

* * *

(c) PRESUMPTION OF APPLICABILITY . . .
(2) until such time as the presumption [of applicability] is rebutted, the person or entity shall be immune from any administrative, civil, or criminal penalty for the violation.

H.R. 1047, § 6. *See also* S. 582, § 3803.

This provision would not apply:

if the person or government entity making the disclosure has been found by a Federal or State court to have committed a pattern of significant violations of Federal or State laws, or orders on consent, related to environmental quality, due to separate and distinct events giving rise to the violations, during the 3-year period prior to the date of disclosure.

H.R. 1047, § 6(b). *See also* S. 582, § 3803(b).

reflected in certain state statutes.[89]

These bills would have provided more protection for environmental audits than would the common law privilege, even if it were to apply.[90] To receive the statutory privilege and immunity offered in the bills, however, companies were required to satisfy the reporting and compliance action prerequisites. In this respect, the bills would have done more to foster cooperation and compliance by companies that voluntarily audit and wish to receive the protections offered by the statutes than would the one-way benefit that the common law privilege provides. Moreover, the bills would have complemented existing state environmental audit legislation, as the federal bills would have applied to federal actions and to the federal EPA.

For the same reasons it has opposed the state legislation, the Clinton Administration opposed these bills.[91] An EPA official testified before Congress against S. 582, objecting to the bill on the grounds that "it would cripple environmental law enforcement and the public's right to know."[92] The EPA also objected on the grounds that the privilege provision was "vague" and too "broad," and would require EPA to litigate questions over whether the evidentiary privilege applied.[93]

To date, at least one environmental audit bill has been introduced in the 105th Congress that would provide privileges for environmental audits. S. 866, the Environmental Protection Partnership Act, was introduced on June 10, 1997.[94] That bill contains privilege and immunity provisions based on S. 582 and H.R. 1047, but it attempts to solve some of the deficiencies discussed in the hearings on those bills.[95]

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[89] *See Hearings on S. 582 before the Subcomm. on Administrative Oversight and the Courts of the Comm. on the Judiciary*, 104th Cong., 2d Sess. 7 (1996) (statement of S. Hatfield).

[90] The common law privilege would not protect facts and would not preclude discovery by the government.

[91] *See Hearings on S. 582 before the Subcomm. on Administrative Oversight and the Courts of the Comm. on the Judiciary*, 104th Cong., 2d Sess.12 (1996) (statements of Steven A. Herman, Assistant Administrator, Office of Enforcement and Compliance Assurance, U.S. EPA and Lois Schiffer Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice and Veronica Coleman, U.S. attorney, Western District of Tennessee).

[92] *Id.* at 12.

[93] *Id.*

[94] S. 866, 105th Cong., 1st Sess. (1997).

[95] The general privilege section of S. 866 provides, in part, as follows:

> Sec. 3601 Admissibility of environmental audit reports
>
> (a) GENERAL RULE
>
> (1) IN GENERAL - Except as provided in paragraphs (2) and (3), an environmental audit report that is prepared in good faith, or a finding, opinion, or other communication that is made in good faith by a person or government entity and that is related to, and essentially constitutes a part of, an environmental audit report, shall not be --

Certain procedural additions to the bill include detailed procedures for in camera review for privilege determinations, procedures allowing seizure of the audit information pending an in camera privilege review if there is independent information establishing probable cause to believe that a federal crime has been committed and that the audit report may contain discoverable information concerning the crime, and procedures for resolving immunity disputes.[96]

One significant addition to the bill is a limitation on the immunity afforded by the bill, such that immunity from civil and criminal sanctions would be precluded if the violation was intentional or willful or was a "knowing endangerment offense" under certain statutes, or if certain other specific circumstances exist.[97] Another

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(A) subject to discovery or any other investigatory procedure; or

(B) admissible as evidence in any judicial action or administrative proceeding.

(2) EXCLUDED ITEMS - Paragraph (1) shall not apply to --

(A) a document, communication, data, report, or other item of information that is required to be collected, developed, maintained, or reported to a regulatory agency under a covered Federal law . . . .

(3) INAPPLICABILITY - Paragraph (1) shall not apply to an environmental audit report if . . . a judge determines that --

(A) the person or government entity that initiated the environmental audit expressly waives, pursuant to subsection (b), the protection provided by paragraph (1);

(B) the environmental audit provides evidence of noncompliance with a covered Federal law and appropriate efforts to achieve compliance were not promptly initiated and pursued with reasonable diligence;

(C) the person or government entity that is asserting the applicability of paragraph (1) is doing so for a fraudulent purpose; or

(D) the environmental audit report, finding, opinion, or other communication was prepared for the purpose of avoiding disclosure of information required for a governmental investigative, administrative, or judicial proceeding that, at the time of preparation, was imminent or in progress.

S. 866, § 3601(a).

[96] S. 866, §§ 3601(c), 3603(f).

[97] The immunity section of the bill contains the following language:

Sec. 3603 Disclosures

(a) In GENERAL - If a person or government entity discloses information relating to a covered Federal law to an appropriate official of a Federal or State agency responsible for administering the covered Federal law, the disclosure shall be considered to be a voluntary disclosure subject to protection under subsection (b), regardless of whether the disclosure is required by law, if --

(1) the disclosure arises out of a voluntary

environmental compliance management system by the person or government entity;

(2) the disclosure is made promptly after the person or government entity receives knowledge of the information;

(3) the person or government entity initiates an action to address the issues identified in the disclosure --

(A) within a reasonable period of time after receiving knowledge of the information; and

(B) within a period of time that is adequate to achieve compliance with the requirements of the covered Federal law that is the subject of the action; and

(4) the person or government entity reasonably provides any further relevant information requested, as a result of the disclosure, by the appropriate official of the Federal or State agency responsible for administering the covered Federal law, not including information protected by this chapter, the attorney-client privilege, the attorney work product doctrine, or any other applicable privilege.

(b) LIMITED IMMUNITY -

(1) IN GENERAL - Subject to paragraph (2), if a person or government entity makes a voluntary disclosure under subsection (a) --

(A) the person or government entity shall be immune from any enforcement action brought as a result of the disclosure; and

(B) the disclosed information shall not, in any court or administrative proceeding, be subject to discovery or be admissible against the person or government entity that made the disclosure.

(2) PERMISSIBLE SANCTIONS AND ADMISSIONS INTO EVIDENCE - Paragraph (1) does not preclude --

(A) imposition of a civil sanction in an administrative or civil action to the extent that a violation was committed intentionally and willfully;

(B) imposition of a criminal sanction --

(i) against a natural person, if --

(I) the person committed, or aided or abetted the commission of, a disclosed violation intentionally or willfully; or

(II) the disclosed violation is a knowing endangerment offense described in section 309(c)(3) of the Federal Water Pollution Control Act (33 U.S.C. 1319(C)(3)), section 3008(e) of the Solid Waste Disposal Act (42 U.S.C. 6928(e)), or section 113(c)(5) of the Clean Air Act (42 U.S.C. 7413(c)(5)); or

(ii) against an entity other than a natural person, if --

(I) the disclosed violation was committed intentionally and willfully by a member of the entity's senior management;

(II) the disclosed violation is knowing endangerment offense described in section 309(c)(3) of the Federal Water Pollution Control Act (33 U.S.C. 1319(c)(3)),

major addition is a section allowing states to enact certain types of audit privilege and immunity laws to apply to state and local proceedings and prohibiting federal agencies (EPA) from refusing to authorize state programs because a state has an audit privilege law.[98]

Although S. 866 contains provisions to address some of the criticisms directed at S. 582 and H.R. 1047 -- that the privilege would hamper enforcement and let the worst violators go free -- the controversy over environmental audit privileges and immunities laws is not likely to decrease since the dispute is as much about the policy behind them as it is about the specific measures in the bills. That controversy will most likely continue for some time.

2. OSHA Reform Bills

There also has been federal legislative activity to create an audit privilege for OSH audits. As of mid-1997, senators introduced three separate bills that contained privilege and immunity measures to encourage auditing.

The Occupational Safety and Health Reform Act of 1997, S. 461, contains a privilege provision for OSH audits that would protect against the employer or his agent being required to disclose audit information "in any inspection, investigation, or enforcement proceeding conducted pursuant to this Act."[99] This provision, therefore, would not extend the privilege as far as the environmental audit bills. Significantly, S. 451 would not provide for the privilege to apply to other types of

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> section 3008(e) of the Solid Waste Disposal Act (42 U.S.C. 6928(e)), or section 113(c)(5) of the Clean Air Act (42 U.S.C. 7413(c)(5)); or
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> (III) the entity's policies or lack of preventive actions or systems contributed materially to the occurrence of the violation; or
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> (C) admission of information into evidence for the purpose of seeking injunctive relief against the person or government entity to remedy a continuing adverse public health or environmental effect of a violation.

S. 866, § 3603.

[98] S. 866, § 3604.

[99] The subsection in the bill reads as follows:

> (i) Any records or other information created by or for an employer for the purpose of conducting safety and health inspections, audits, or reviews not required by this Act shall not be required to be disclosed by the employer or the agent of the employer in any inspection, investigation, or enforcement proceeding conducted pursuant to this Act.

S. 461, § 5(i).

actions, such as tort actions, which are not enforcement actions.

The bill would establish a "voluntary compliance" program whereby an employer would be exempt from OSHA inspections and investigations if the employer provides evidence to the Secretary of Labor that the place of employment has been inspected under one of the several consultation programs described in the bill or under its own safety and health program, which includes certain features.[100] The qualifying consultation services include state consultation programs or certified private programs. The employer's own safety and health program must include audit procedures and procedures for timely correcting hazards, as well employee participation activities. Thus, the bill uses an exemption from inspection and investigation to further encourage auditing activity.

Finally, S. 461 would provide for limited immunity for employers with a safety and health program.[101] Employers with a written safety and health program would receive a 25 percent penalty reduction. Those with both a written safety and health program and an exemplary safety record will receive a 50 percent reduction.

The OSHA Modernization Act of 1997, S. 551, contains similar provisions. Under this bill, an employer who meets certain preconditions would be exempt from inspections and investigations. The preconditions are very similar to those for the inspection exemption in S. 461: The place of employment must have been inspected in the preceding year under one of the consultation programs described in the bill or the workplace has an exemplary safety and health record and the employer has a safety and health program that includes auditing, among other things.[102]

The bill contains a different privilege provision than S. 461. The privilege provided in S. 551 applies to audits conducted by employers outside of a voluntary compliance program established by OSHA. This privilege provides protection from disclosure to the Secretary of Labor unless disclosure would be part of an investigation into a fatality or serious injury or the employer has not taken steps to correct serious hazards identified during the audit,[103] and is therefore a very limited privilege. Like the limited privilege in S. 461, it only would protect from disclosure in OSHA investigatory or enforcement actions, not in private actions. Furthermore, the limitation precluding application of the

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[100] S. 461, § 8A.
[101] S. 461, § 12(a)(3).
[102] S. 551, § 8A.
[103] S. 551, § 8A(f).

privilege in situations where the employer has not corrected hazards identified in the audit begs the question of how OSHA would know that the hazard had been identified in the audit in the first place, until OSHA had discovery of the audit information. Further, this privilege appears to be limited to documentation since the language used is "records". Presumably there wo uld be no testimonial privilege under this provision.

S. 551 also contains a limited immunity that provides for penalty reductions as S. 461 does. S. 551 goes a step further, however, by providing for a seventy-five percent penalty reduction where the worksite has been inspected under a consultation program and the employer has complied with OSHA's recommendations that would bring the employer into compliance.[104]

Finally, the bill provides for the establishment of a voluntary protection program that would exempt qualified program participants from inspections and certain paperwork requirements. To become qualified for the program, employers would have to have in place a safety and health program that presumably would include regular auditing to identify workplace hazards.

The third OSHA Reform bill to be introduced in the Senate in the first session of the 105th Congress is S. 765. Like the other bills already described, S. 765, the Safety and Health Advancement Act, contains measures to encourage active employer self-policing. The bill contains a detailed description of a "third party consultation services program" that includes certification of safety and health professionals to conduct audits at employer workplaces.[105] These "consultants" would perform inspections, much like OSHA would, to inform employers of violative conditions and to give them an opportunity to correct those conditions and then obtain a "declaration of compliance." An employer who receives a declaration will be rewarded with a two-year exemption from the assessment of any civil penalty. However, there would be no exemption if the employer did not make a "good faith effort to remain in compliance under the declaration" or if there were a "fundamental change in the hazards of the workplace.[106] Thus, this bill goes further than the other two in creating complete immunity from civil penalties, as long as the employer meets the specified conditions. This would be a strong incentive to participate in the consultation program.

The bill also would provide a broader privilege than the other bills. The privilege would apply to "any records relating to consultation

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[104] S. 551, § 8(j)(2)(B).
[105] S. 765, § 8A.
[106] S. 765, § 8A(f).

services . . . provided by an individual qualified under the program."[107] Such records would not be admissible in any court or administrative proceeding, except a disciplinary one against the consultant. This privilege, then, would apply to claims outside the OSH Act. A significant limitation on the privilege, however, is that it only applies to consultation services provided by a third party as they are set out in the bill. It would not apply to audits conducted by the employer independent of the formal consultation services to be established by the bill. As it is drafted, this provision has two other limitations. It does not apply to testimony, and it is not a privilege against discovery. It only says that the records are not "admissible."[108]

The bill also would establish voluntary protection programs.[109] Two programs are described, both of which would include auditing. "Cooperative agreements" calls for agreements between OSHA and employers to establish "comprehensive safety and health management systems" that include, among other things, "requirements for systematic assessment of hazards." Like S. 461 and S. 551, the bill describes a "voluntary protection program" that would "encourage and recognize the achievement of excellence in both the technical and managerial protection of employees from occupational hazards."[110] This program also would include auditing.

All three of these bills take very different approaches to granting audit privileges and providing immunities for employers who audit than the environmental audit bills do. As of this writing, the OSHA Reform bills are still the subject of debate and negotiation and it is not yet clear if any of these three bills, a combination of the three, or an entirely different bill will be enacted.[111]

VI. EXECUTIVE BRANCH INITIATIVES TO ENCOURAGE AUDITING

A. EPA

Since 1986, EPA has had a series of formal policies intended to encourage companies to audit their compliance with environmental laws

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[107] S. 765, § 8A(e).

[108] *Id.*

[109] S. 765, § 14.

[110] S. 765, § 14(b).

[111] S. 1237, 105th Cong., 1st Sess. (1997); H.R. 2579, 105th Cong., 1st Sess. (1997); H.R. 2869, 105th Cong., 1st Sess. (1997); *See* Dean Scott, *Employer Groups Considering Strategy to Protect Confidentiality of Self-Audits*, DAILY LABOR REPORT (BNA), Dec. 16, 1997, at A-7; Dean Scott, *Supporters Call Bill a New Approach; Panel Chairman Pledges Early Consideration*, OCCUPATIONAL SAFETY & HEALTH (BNA), Oct. 1, 1997, at 579-80.

and regulations.[112] The policy stated that "EPA will not routinely request environmental audit reports. . . . EPA's authority to request an audit report . . . will be exercised on a case-by-case basis where the Agency determines it is needed to accomplish a statutory mission, or where the Government deems it to be material to a criminal investigation."[113] In terms of any immunity, the policy stated that "[i]n fashioning enforcement responses to violations, EPA policy is to take into account, on a case-by-case basis, the honest and genuine efforts of regulated entities to avoid and promptly correct violations and underlying environmental problems."[114]

The policy, therefore, was rather vague, both in terms of any statement that EPA would not seek to discover audit information in investigations or enforcement actions and in terms of any immunity from penalties that companies could gain from voluntarily auditing their compliance. Companies obtained no real assurance from this policy that auditing would not create evidence that EPA would seek to use against them, and no real promise of immunity as a reward for conducting audits.[115]

In 1991, the U.S. Department of Justice also issued an audit policy.[116] This is an internal guideline for prosecution decisions where issues concerning environmental audits arise. The intent was to avoid "undermin[ing] the goal of encouraging critical self-auditing, self-policing, and voluntary disclosure."[117] The policy specified factors for prosecutors to consider in deciding whether and how to prosecute. These factors include disclosure of the violation, cooperation with the

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[112] The 1986 policy stated, "[i]t is EPA policy to encourage the use of environmental auditing by regulated entities to help achieve and maintain compliance with environmental laws and regulations, as well as to help identify and correct unregulated environmental hazards." EPA, Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004 (1986).

[113] *Id.* at 25,007.

[114] *Id.*

[115] One commentator described companies' concerns in this way:

> Corporations view [the 1986] policy as a Hobson's choice. On one hand, auditing is a valuable tool to avoid noncompliance with environmental laws. On the other hand, the information revealed by an audit creates a risk of legal liability. If the audit reveals violations of the law, not only must the firm report the violations and subject itself to penalties, but regulators may potentially use the audit itself to establish the requisite knowledge for a criminal action against a corporation's executive officers.

Harris, *supra* note 1, at 683. *See also* Sorenson, *supra* note 53, at 486.

[116] U.S. DEPT. OF JUSTICE, FACTORS IN DECISIONS ON CRIMINAL PROSECUTIONS FOR ENVIRONMENTAL VIOLATIONS IN THE CONTEXT OF SIGNIFICANT VOLUNTARY COMPLIANCE OR DISCLOSURE EFFORTS BY THE VIOLATOR, July 1, 1991.

[117] *Id.* at 1.

government, whether the company has a compliance program, and others. Companies also found this policy to be somewhat unsatisfactory because it does not guarantee that the government will not use audits against the companies.[118]

In 1994, the EPA issued a "restatement" of its audit policy in response to the criticism of the 1986 policy.[119] This restatement reiterated EPA's interest in encouraging auditing, and toward that end, stated that "a violation that is voluntarily revealed and fully and promptly remediated as part of a corporation's systematic and comprehensive self-evaluation program generally will not be a candidate for the expenditure of scarce criminal resources."[120]

EPA completely revised its audit policy in 1995. The new policy, Incentives for Self-Policing: Discovery, Disclosure, Correction, and Prevention of Violations, is still in effect and contains several significant provisions.[121] Unlike the earlier policy, the 1995 policy contains specific privilege and immunity provisions. In the policy, EPA commits to "not seek gravity-based penalties for violations found through auditing that are promptly disclosed and corrected" as long as the conditions set out in the policy are met.[122]

EPA also commits in the policy not to "routinely request" audit information. EPA states that it "will not request for use an environmental audit report to initiate a civil or criminal investigation of the entity."[123] The policy includes the further statement that "[i]f the Agency has an independent reason to believe that a violation has occurred, however, EPA may seek any information relevant to identifying violations or determining liability or extent of harm."[124] Therefore, the policy does not include a blanket agreement not to seek audit information in agency investigations or to use that information in

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[118] Sorenson, *supra* note 53, at 486.

[119] EPA, Restatement of Policies Related to Environmental Auditing, 59 Fed. Reg. 38,455 (1994).

[120] 59 Fed. Reg. at 38,549.

[121] EPA, Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. 66,706-66,712 (1995).

[122] *Id.* at 66,711. The conditions are that (1) "the violation was discovered through an environmental audit or . . . systematic procedure . . . reflecting the regulated entities due diligence"; (2) "the violation was identified voluntarily"; (3) the company disclosed the violation within 10 days of discovery; (4) the discovery and disclosure were made independent of any government action or citizen suit or other third party revelation; (5) the company corrects the violation within a specified period of time; (6) the company takes steps to prevent a recurrence; (7) the same violation has not occurred in the previous three years; (8) the violation is not one of those excluded in the policy; and (9) the company cooperates with the EPA in providing additional necessary information.

[123] *Id.* at 66,711.

[124] *Id.*

enforcement actions.

Finally, the policy states that EPA will not recommend criminal action in cases where all of the conditions for obtaining a complete gravity-based penalty immunity exist.[125] There are two exceptions to this statement. The agency may still seek criminal charges if there is a "prevalent management philosophy" that allowed violations to exist or there is willful involvement by a high-level corporate official in the violation. EPA also "reserves the right" to recommend criminal charges for any individual's criminal acts.

The 1995 Policy represents a major advance in EPA's approach to encouraging auditing. However, it has met some criticism. First, it does not, and cannot, limit private persons' rights to sue companies.[126] This is perhaps the greatest problem with using agency-level policy or regulations to address the audit privilege question. By its very nature, a policy created by EPA can only address what EPA will do, it cannot direct the courts not to admit audits into evidence, as a federal statute can do. It also cannot direct the Department of Justice, which has its own policy and decisionmaking structure. Furthermore, the 1995 Policy is only a policy document, it is not a regulation. EPA can change it at any time and EPA can choose not to follow it at any time. The 1995 Policy does contain some assurances and incentives for companies, but it can only go so far.

B. OSHA

OSHA has taken a completely different approach than EPA to encouraging auditing. Rather than establish a formal policy on auditing, OSHA has put programs into place which encourage auditing and employer participation or partnership with the agency in improving occupational safety and health. OSHA is also preparing a regulation to require auditing.

One of these programs is the Cooperative Compliance Program (CCP). As of this writing, OSHA was just beginning to institute the CCP nationwide after a long period of state experimentation with CCPs.[127] Under the CCP, employers with the worst injury and illness records would be given a choice of instituting safety and health programs and in turn being subject to fewer and more focused inspections or

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[125] *Id.*; *see supra* note 121.

[126] Sorenson, *supra* note 53, at 507.

[127] *NACOSH: OSHA's Not Ready To Go Public With New CCP Program*, INSIDE OSHA (BNA), June 16, 1997, at 11-12.

remaining on the general inspection list. The safety and health program that employers would have to implement would include an auditing component.[128]

Another of these programs is the Voluntary Protection Program ("VPP") that OSHA has established to reward the companies with the best safety and health programs and injury and illness records.[129] In order to be a VPP participant, companies must successfully complete an evaluation of their program and operation. The program includes auditing; however, none of these programs includes a privilege.

Based upon its experience with these voluntary programs, OSHA is now drafting a Comprehensive Safety and Health Program regulation. As of this writing, the regulation is in the pre-proposal stages of rulemaking.[130] Among the requirements in the draft regulation is one calling for "hazard assessment" or auditing.[131] As it is currently drafted, the regulation would require employers to conduct hazard assessments or face penalties for not doing so. The regulation, however, would not provide any privilege for audit information. Therefore, if this regulation is promulgated as it is currently written, OSHA would be requiring audits, rather than simply encouraging voluntary auditing as it has done in the past. This is a very different approach than that which OSHA has taken in the past and than that of the EPA. Undoubtedly, there will much debate and discussion about this controversial regulation in the months to come.[132]

VII. CONCLUSION: LESSONS LEARNED AND SUGGESTIONS FOR AN OSH AUDIT PRIVILEGE

A number of lessons can be taken from an analysis of the audit privilege landscape. The first "lesson learned" is that the courts cannot be relied upon to provide an audit privilege for OSH audits based solely on common law principles. Courts can be expected to reach the same

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[128] *Id.*

[129] *See The United States Department of Labor Occupational Safety and Health Administration* (visited Jan. 7, 1997) <http://www.osha.gov/oshprogs/vpp>.

[130] OSHA's Working Draft of a Proposed Safety and Health Program Standard, Nov. 15, 1996, copy on file with the author.

[131] *See id.* at §§ (b)(2), (d).

[132] OSHA has had a practice of collecting employers' audit information for use in investigatory and enforcement actions. In fact, OSHA has resisted suggestions that it adopt a policy that it not seek or use employer audit information. O.S.H. Rep. (BNA), 540 (Sept. 18, 1996). This draft regulation should increase employer concern about audits being used against the companies who create them, thereby discouraging candid and honest self-evaluations and undermining the intent of the regulation that effective safety and health programs be implemented.

conclusions about protection of OSH audits that they have already reached in the few environmental audit cases they have decided. Even if they were to extend a privilege to an OSH audit under the circumstances of the particular case, presumably only analysis and opinion would be privileged. Facts would be subject to disclosure. Moreover, a single case or even a few cases decided in favor of a company seeking to protect its audit information would not necessarily signal a trend toward OSH audit protection in the federal courts since such cases are heavily factually based and the courts have repeatedly announced their reluctance to extend the privilege to a broad category of cases. These pronouncements cannot give much assurance to companies that the courts will protect their audit records.

The second lesson is similar to the first -- the courts cannot be expected to extend the attorney/client privilege or the work product doctrine to protect OSH audits. These doctrines have very specific requirements that few audit cases could meet. In general, these doctrines will not be the basis for protecting OSH audits.

The third lesson is that agency audit policies, and other programs with a "carrot and stick" approach to encourage auditing, may be helpful to companies and to the agency, but they cannot go far enough to give the companies complete protection from having audits used against them. Agency policies and programs can protect companies from the various ways the particular agency can use audits against a company, but agencies do not have the authority to limit third parties from obtaining audit information in discovery or admitting it into evidence in a third party suit against a company.

The fourth lesson is that state legislation, while helpful in certain contexts, such as predicting state agency enforcement powers, suffers as a solution to the overall problem for corporations because it does not present a uniform and consistent approach to audit protection, and because it cannot control enforcement at the federal level. This complicates decisionmaking about audit policies for companies with multi-state operations, and it adds to the competitive burdens on companies in certain states with one form of audit legislation versus companies in other states with a different form of audit legislation that may be more financially beneficial to corporations.

The conclusion to be reached from this analysis is that federal legislation for OSH audits, and for environmental audits, is necessary. Federal legislation would create a more uniform OSH audit privilege law, although there likely would be certain interpretive differences across the various federal judicial jurisdictions.

The federal OSH audit legislation should contain the following

measures. The federal statute should establish a minimum level of protections which states must meet, although states may provide more incentives to encourage audits. The law should provide a privilege against use of audit reports, including facts and opinions they may contain, in any administrative, civil or criminal action, whether state or federal. The privilege should not apply where employers conducted the audit in bad faith, such as to commit fraud or to conceal evidence of noncompliance. The federal legislation should also include a testimonial privilege.

The legislation also should provide either full immunity from penalties or a penalty reduction in an amount that would create a strong incentive for companies to audit. The final major provision should be to require companies to report any OSH regulatory or statutory violations and take reasonable steps to bring their operations into compliance within a reasonably prompt period of time in order to receive the privilege and immunity protections provided by the statute.

Such an enactment will increase companies' realistic expectations and understandings of what penalty reduction benefits they may gain by auditing their OSH practices and what they have to do to obtain those benefits. It also would provide them with assurance that they may determine with some certainty the remaining legal risks associated with auditing. By thus encouraging increased self-policing, OSHA will benefit from a reduced need for enforcement and inspection activity and the workforce and the public will benefit from a reduction in occupational injuries and illnesses due to companies' increased proactive compliance efforts.